IN THE UNITED STATES COURT OF FEDERAL CLAIMS

THE WHITE MOUNTAIN APACHE TRIBE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No.: 17-359 L
	)	
THE UNITED STATES OF AMERICA,	)	Judge Edward J. Damich
	)	
Defendant.	)	Electronically filed
	)	

UNITED STATES' RESPONSE TO PLAINTIFF'S APRIL 20, 2018 SUPPLEMENTAL BRIEF REGARDING RECONSIDERATION

On January 5, 2018, this Court held that Plaintiff's pre-2011 forest management claims were barred by the statute of limitations because Plaintiff's allegations regarding the 2005 Forest Management Plan ("Plan") prove Plaintiff "was aware of facts relating to its forest management claims" before 2011. ECF 22 at 8. This Court subsequently requested supplemental briefing on six questions relating to Plaintiff's motion to partially reconsider that decision. ECF 36. Defendant hereby provides its response to Plaintiff's answers, ECF 37, to the Court's questions.

1. Plaintiff identifies no express promise to remedy forest management deficiencies, much less one that justifies its delay in bringing its 2005-2011 claims.

Plaintiff falls far short of establishing that the Bureau of Indian Affairs ("BIA") made any promise that would excuse Plaintiff's delay in bringing its 2005 to 2011 forest management claims. Plaintiff's three previous briefs on this subject failed to identify the specific promises that Plaintiff contends justify Plaintiff's delay. *See* ECF 36. Plaintiff's Supplemental Brief highlights why Plaintiff was (and continues to be) unable to identify any relevant promissory language. ECF 37 at 1-4. Plaintiff's citations to the Plan: (1) are clearly qualified in a manner that defeats Plaintiff's assertion that BIA made specific promises; or (2) set forth only aspirational goals or objectives. Significantly, Plaintiff cites no "promise" that would justify its delay in bringing pre-2011 claims under Section 98(b) of the Restatement of Trusts – the primary focus of Plaintiff's briefs and this Court's questions. Section 98(b) could only conceivably apply if: (1) Plaintiff complained of a breach of trust; (2) Defendant assured Plaintiff "of corrective action;" and (3) any delay in bringing suit "reasonably result[ed] from reliance on that assurance." RESTATEMENT THIRD OF TRUSTS § 98(b). While Plaintiff cites language identifying

forest management issues, Plaintiff identifies no assurance of corrective action or promise to remedy alleged deficiencies, much less any promise justifying Plaintiff's delay in bringing its 2005-2011 claims.

Plaintiff contends that the Plan sets "forth a broad and express promise to implement the FMP over the ten-year planning period." ECF 37 at 1. But the language Plaintiff cites does nothing more than broadly characterize the Plan as an effort to, among other things, "improve" forest health. *Id*. It sets forth no assurances that could remotely be relied upon to toll the statute of limitations. Moreover, Plaintiff omits language in the same page of the Plan explicitly stating that "[p]rogram implementation is dependent upon funding levels and other Congressional or Departmental mandates which could impact program execution" and providing for "revisions … to incorporate improved management direction or to meet unanticipated demands or changing Tribal priorities." ECF 9-2 at 14; *id*. at 17 (Tribes "require a higher degree of flexibility in management planning than is normally required or considered ideal").[1] This language making the Plan's general objectives contingent on funding, unanticipated demands, and changing Tribal priorities is sufficient, standing alone, to defeat Plaintiff's characterization of the Plan as an explicit promise. *See Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 71 (2004) ("unlike a specific statutory command requiring an agency to promulgate regulations by a certain date, a land use plan is generally a statement of priorities; it guides and constrains actions, but does not (at least in the usual case) prescribe them. It would be unreasonable to think that either Congress or the agency intended otherwise,

[1] Defendant's citations to the Plan refer to the ECF pagination in order to facilitate this Court's review of the supplemental briefs. See ECF 37 at 2 n.1.

since land use plans nationwide would commit the agency to actions far in the future, for which funds have not yet been appropriated"); *Goldstick v. Kusmiersky*, 593 F. Supp. 639, 647 (N.D. Ill. 1984) (contingency in alleged promise defeats estoppel claim).

Plaintiff simply identifies no promise to remedy problems, much less any promise that justifies its delay in bringing. Indeed, some of the issues Plaintiff identifies, such as "annual loss . . . in tree growth and mortality" cannot be remedied. ECF 9-3 at 142. While the Court's analysis need proceed no further, Plaintiff's identification of individual passages from the Plan also fail to establish the existence of any binding promise.

Timber Volume (Annual Allowable Cut)

Plaintiff contends that an "objective to 'prepare sales of sufficient volumes of timber to meet the annual allowable cut'" is an express promise. But general objectives or expectations are not express promises. *See Ctr. for Biological Diversity v. Provencio*, 2012 U.S. Dist. LEXIS 50457, *31-32 (D. Ariz. Jan. 23, 2012) (generalized or vague goals are unenforceable); *In re Hardieplank Fiber Cement Siding Litig.*, 284 F. Supp. 3d 918, 975 (D. Minn. 2018); *Stoddard v. Roden*, 2012 U.S. Dist. LEXIS 68844, *14 (D. Mass. 2012). Even if aspirational language regarding the AAC constituted a promise, it bears no relation to Plaintiff's claim alleging "the Government's failure to attain the ten-year cutting budget and 'annual allowable cut' over the course of the 2005-2014 FMP." ECF 26-1 at 13. Plaintiff identifies no promise excusing its failure to challenge annual cuts processed by Plaintiff's sawmill in a timely manner. Plaintiff's other efforts, ECF 37 at 3, to support its timber cutting claim does not withstand scrutiny. The passages Plaintiff relies upon highlight the non-binding, contingent nature of AAC projections:

- "The **planned** management period will annually harvest 40.3 million board feet (Gross MMBF) for $24.34 million in gross annual revenue. . . . The planned management also calls for the harvest of 19,259 acres per year for an average harvest of 19,105 cords per year. In 1997, poles were selling for $20.00 per cord, however, **that market is no longer available**. It is therefore **very speculative** to ascertain what value; in any, that pole timber will have in the near or distant future. **If no market is developed** it could cost $20 to $26 per ton to remove the pole timber." ECF 9-3 at 148-149 (emphasis added)
- "It should be noted that the **estimated sale volumes are for planning purposes only and are not to be considered targets**." ECF 9-3 at 155 (emphasis added).

Thinning

Plaintiff knew the extent of thinning at the time Plaintiff conducted the work. ECF 21 at 12-13. Plaintiff identifies no BIA promise that excuses Plaintiff's failure to timely challenge that thinning. Indeed, Plaintiff cites to no promises of any sort.

- As discussed above, the FMP's statement of objectives can only be interpreted as such—objectives. Four of Plaintiff's five citations are to statements that are non-binding, aspirational "objectives." ECF 37 at 3; ECF 9-3 at 53.
- Plaintiff's fifth citation cites to one of the Plan's standards. But "[p]rotection standards and guidelines define the bounds or constraints within which all management practices would be carried out in achieving the planned multiple-use goals." ECF 9-2 at 25. Standards guide unspecified future actions rather than promising particular actions or outcomes. Plaintiff fails to cite to the "fuels management" standards, *id*., which address thinning through prescribed burns. Rather than promise prescribed burns, those standards state that "[f]uels management policies will be based on the location, distribution, potential fire hazard of fuels, and potential smoke management problems." ECF 9-2 at 29.

Plaintiff identifies no express promises to remedy deficiencies through thinning. Nor would such a promise reasonably toll the statute of limitations. Plaintiff's underlying contention is that thinning work Plaintiff conducted under a 638 contract was inadequate and the failure to conduct thinning impeded tree growth and increased risks or actual damages from insects, disease, and fire. ECF 37 at 3. If Plaintiff's forests were being harmed by a failure to conduct adequate thinning, Plaintiff identifies no basis for delaying suit challenging work Plaintiff itself conducted under 638 contracts.

Insects and Disease

Similar to its other deficiencies, Plaintiff identifies nothing that would justify any delay in challenging management practices relating to insects and disease. The Complaint alleges annual losses from insects and disease. ECF 22 at 8. Unsurprisingly, Plaintiff identifies no promise to revive trees that were destroyed by mistletoe or beetles. Put another way, Plaintiff's delay in bringing claims relating to the damage caused by insects and disease between 2005 and 2011 was not reasonable because the Plan quantified estimated annual damage from insects and disease and did not (and could not) promise to remedy such damage. *See* RESTATEMENT OF TRUSTS 3D § 98.

- Plaintiff identifies general, non-promissory objectives to control insects and diseases. ECF 37 at 3.
- BIA's plan to "take a proactive approach to avoid the detrimental effects of catastrophic fire and epidemic insect and disease outbreaks," ECF 37 at 3 (citing ECF 9-2 at 113), highlights the deficiencies in Plaintiff's analysis. First, BIA did not, and could not, promise to avoid all such damage. Second, BIA did not, and could not, promise to repair all such damage. Third, such damage was fully disclosed and readily apparent. ECF 9-3 at 125-43.
- Rather than promise particular treatments, a page Plaintiff cites states that "a full range of silvicultural treatments will be available for use." ECF 9-2 at 113.
- Rather than promise action, a page Plaintiff cites states that BIA will take action "only after thorough consideration of all feasible suppression alternatives . . . consultation with, and concurrence by, the WMAT." ECF 9-3 at 2.
- Efforts to "ameliorate . . . outbreaks . . . where a positive outcome can be expected" do not constitute a promise to combat all disease and insect outbreaks, much less to remedy all damages from such outbreaks. ECF 9-3 at 143.

The Plan's statement that BIA planned to fight pests is not a promise to remedy damage from pests. Contrary to Plaintiff's assertion, the Plan explicitly envisions that insects and disease will damage and destroy trees. It addresses insects and disease, in part, by providing for salvaging damaged trees. ECF 9-2 at 40-41. The Plan cannot be read as a promise to combat, much less remedy, all insect and disease damage. No

promise excuses Plaintiff's delay in bringing its 2005-2011 claims. The Plan's 2005 acknowledgement that pests and insects annually damaged Plaintiff's forests is the latest date on which the statute of limitations was triggered.

Woodland Management Plan

Plaintiff's reliance on an objective to "upgrade woodland management practices" by "[p]rovid[ing] a management system which will identify woodland products, values, locations, quantities, and ecologically sound utilization practices," ECF 37 at 4 (quoting ECF 9-3 at 88), highlights the absence of a relevant promise. If Plaintiff's claim is that it was harmed by BIA's alleged failure to comply with a trust duty to provide a woodland management system, Plaintiff identifies no basis for delay in bringing such a claim.

Forest Inventory and Modeling

Plaintiff fails to suggest how any promise to conduct an inventory could be construed as a promise to remedy anything other than a failure to conduct an inventory – which Plaintiff contends did not occur until 2015 – within the statute of limitations.

- Plaintiff's citation to gathering forest-level inventory at 10-year intervals places any claim relating to a failure to gather such inventory outside of the contested 2005 to 2011 period. ECF 37 at 4.
- Plaintiff's citation to non-binding objectives, ECF 37 at 4, fails to identify a promise.
- Plaintiff's citation to a statement regarding monitoring outbreaks "annually," *id.* (citing ECF 9-3 at 143) defeats Plaintiff's effort to toll the statute of limitations by suggesting, if anything, that Plaintiff should challenge any such failure to monitor annually rather than waiting over a decade.

Environmental Assessment ("EA")

Plaintiff is incorrect, ECF 37 at 4-5, that the EA justifies Plaintiff's delay in bringing its 2005-2011 claims. The EA stated that the Plan is "intended to be flexible [and] reflect the most current viable management alternatives. Periodic revisions may be

necessary to incorporate new management direction, after a catastrophic event, or to meet unanticipated opportunities, demands, or changing tribal priorities." ECF 21-9 at 11. The EA recognizes Plaintiff's significant role in establishing policy over its own forests, stating that "[t]he Tribal Council established the Tribal Plan & Project Review Panel 'to provide the mechanism for full tribal control over natural resources related project planning and management decisions, and to ensure that decisions are integrated and coordinated fully within the expressed policies and directives of the Tribal Council." ECF 21-9 at 13. In short, Plaintiff cites no portion of the EA that promises a corrective action that excuses Plaintiff's delay in filing this suit. RESTATEMENT OF TRUSTS 3D § 98.

Plaintiff's citation to portions of the EA, ECF 37 at 4-6, fail for three general reasons. First, Plaintiff's citations do not rise to the level of specific promises to remedy problems because the EA makes clear that BIA's thinning projections were estimates rather than promises. ECF 21-9 at 49. Such vague statements are not enforceable. *See Aguilar v. Int'l Longshoremen's Union Local #10*, 966 F.2d 443, 446 (9th Cir. 1991) ("promise that is 'vague, general or of indeterminate application' is not enforceable.'"). Second, if Plaintiff is correct that its forests were damaged by a failure to conduct promised annual treatments, ECF 37 at 5-6 n.3, it should have brought that claim in a timely fashion because it was aware of the state of its forests. ECF 22 at 5-8. Third, the EA explicitly envisions the possibility that treatments might not be effective. ECF 21-9 at 35 ("Post burn monitoring . . . would be conducted after all prescribed burns to determine the effectiveness of the burn, whether the prescription was followed, and to determine if the stated objectives were met"). Simply put, BIA did not guarantee that it would remedy all issues impacting over 1,000,000 acres of Plaintiff's forests by 2015.

2 & 4. Plaintiff identifies no implicit promise to remedy management deficiencies.

While Plaintiff disclaims any reliance on implied promises, ECF 37 at 7-8, Defendant responds to the Court's statement that Defendant appears to believe that "promises were only implied from certain acknowledgements of deficiencies in" forest management. ECF 36 at 1.[2] Defendant clarifies that the Plan is not a series of implicit promises or an admission of breaches of trust. It instead discussed issues with Plaintiff's forests and proposed certain actions that BIA planned to take (some through 638 contracts with Plaintiff). But BIA could not promise to take specific actions with funds not yet appropriated by Congress. Nor could BIA promise to remedy all issues faced by Plaintiff's forest given uncertainty regarding future conditions. The Plan is not a promise to remedy all issues facing the forest. It is nothing more nor less than a plan.

3. Plaintiff's inability to articulate the scope of alleged promises is telling.

Plaintiff's suggestion that it "will establish the measures required to fulfill the FMP's express promises and the resulting remedy," ECF 37 at 8, is fatal to its effort to cast the Plan as an express promise to take action. The Court presumably asked Plaintiff to identify the alleged promises' scope because Plaintiff's tolling theory requires that any delay in bringing suit "reasonably result from reliance on that assurance." RESTATEMENT OF TRUSTS 3D § 98. Plaintiff at times appears to characterize language from the Plan or EA projecting **annual** allowable cuts or silvicultural treatments. ECF 37 at 5-6 n.3. But Plaintiff cannot reasonably contend that it was justified in failing to timely challenge the

[2] Regardless, Plaintiff's allusions to implied promises are too vague to justify its delay in bringing its 2005-2011 claims. *See Fox Prods. v. Caterpillar, Inc.*, 2007 U.S. Dist. LEXIS 96849, *13-14 (C.D. Cal. May 31, 2007).

adequacy of harvesting and treatments that Plaintiff itself conducted. At other times, Plaintiff appears to suggest that vague, general objectives constitute the relevant promises. But as discussed above, such statements would be unenforceable even if they were promises, which they are not. The Plan contains no promise whose scope would justify Plaintiff's delay in bringing its 2005-2011 claims.

5. BIA did not promise to remedy any issues by the end of 2014.

Plaintiff's response to the Court's question regarding whether any remedies were to be accomplished by 2014 is based upon several misinterpretations. Plaintiff contends that the Plan instituted a "specified period for performance" of ten years. ECF 37 at 8-9. But Plaintiff identifies no language specifying any performance, much less a performance date. Plaintiff's brief, *id*., rests on the misconception that the "annual allowable cut" is actually a promise to harvest ten years of annual allowable cuts by 2014. Plaintiff's attempt to redefine "annual" to mean "ten years" does not withstand scrutiny. Regardless, Plaintiff pointedly does not site to the Plan's "Harvest Schedule." That section makes clear that "[t]he 10-year cutting budget . . . [contains] estimated sale volumes . . . for planning purposes only and are not to be considered targets." ECF 9-3 at 155. In short: (1) BIA made no promise to harvest the annual allowable cut; (2) planning **annual** allowable cuts is not promising to cut the aggregate annual cut over 10 years; and (3) the harvest schedule is not a "remedy."

Plaintiff avoids the other four categories of "explicit promises," such as "insects and disease," identified in its answer to Question 1. Those categories fare no better. The Complaint makes clear that Plaintiff was aware of **annual** losses to its forests from mistletoe and spruce beetle. ECF 22 at 8. Any suggestion that Defendant promised to

"remedy" (in some undefined manner) quantified damage to trees that died in 2005 or 2006 by 2014 is wholly without support.

Defendant similarly did not promise to conduct an aggregate amount of forest treatments by 2014. Plaintiff appears to claim that Defendant promised to conduct an average of 50,000 acres of prescribed burns and thin "approximately 7,000 acres of forest lands" **annually**. ECF 37 at 5 n.3. Plaintiff does not even attempt to contort these annual estimates into a promise to conduct an aggregate amount of treatments by 2014. Plaintiff points to no promise that would justify Plaintiff's delay in challenging the adequacy of silvicultural treatments that Plaintiff itself was conducting pursuant to 638 contracts.

6. Plaintiff has been equally able to challenge forest management practices throughout the entire 14-year period that the Plan has been in effect.

Defendant does not argue that the Plan's extension through 2019 delays claim accrual. Rather, it points out that Plaintiff's challenge to annual forest management activities in 2015, 2016, and 2017 belies its argument that it lacked information necessary to challenge annual forest management activities in 2005, 2006, 2007, 2008, 2009, and 2010. ECF 32 at 15-16 (Plaintiff's theory, if true, would render its claims unripe but demonstrating that Plaintiff is incorrect). Plaintiff challenges annual decisions regarding harvesting and treating Plaintiff's timber. Plaintiff's challenge to annual decisions after 2015 makes clear that Plaintiff lacks justification for delaying its pre-2011 claims.

Respectfully submitted this 4th day of May, 2018,

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s/ Matthew Marinelli

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CERTIFICATE OF SERVICE

I hereby certify that, on May 4, 2018, I electronically transmitted the foregoing using the ECF system for filing and transmission of a Notice of Electronic Filing to the ECF registrants in this case.

s/ Matthew Marinelli
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